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In The

Supreme Court of the United States

October Term, 1972

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No. 72-1599

ANTHONY RICCARDI,

Petitioner,

vs.

THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTITRARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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In The

Supreme Court of the United States

October Term, 1972

No.

ANTHONY RICCARDI,

Petitioner,

vs.

THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF NEW YORK

Petitioner, Anthony Riccardi,[1] prays that a Writ of Certiorari issue to review the Judgment of the New York State Court of Appeals dated February 27th, 1973.

Opinion Below

The opinion of the New York State Court of Appeals denying leave to appeal is not yet reported. It is set forth in Appendix A to this Petition (1a).[2] No opinion was rendered by the

1. Hereinafter referred to as "Riccardi."

2. References to the petitioner's Appendix in the Appellate Division of the Supreme Court of the State of New York are cited as "R" and to the Opinion of the Supreme Court of the State of New York, Kings Count, as "O."

Opinion Below

Appellate Division of the Supreme Court of the State of New York. People v. Riccardi, 40 A.D. 2d 1083 (1972). The Supreme Court of the State of New York, in and for the County of Kings, rendered an opinion which is set forth in Appendix B to this Petition (2a) and is reported in 73 Misc. 2d 19 (1972).

Jurisdiction

The opinion-certificate denying leave to appeal of the New York State Court of Appeals was filed on February 27th, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

Questions Presented

1. Was the petitioner-defendant in a robbery prosecution denied his Sixth and Fourteenth Amendment rights to adequate and effective assistance of counsel during trial and appeal where his counsel had information that the only prosecution witness mistakenly identified him after his arrest and defense counsel deliberately failed to utilize this information without consulting and obtaining Riccardi's consent?

2. Was the petitioner-defendant denied due process and equal protection of the law where after his conviction and appeal defense counsel obtained oral statements from the only prosecution witness that he was threatened by the arresting officer prior to trial with perjury and jail unless he positively identified petitioner as one of the robbers and defense counsel in relating this information

to the trial prosecutor by silent agreement each deliberately failed without petitioner's consent to bring forth this information to the attention of the Courts for 33 years while the facts were fresh and the prosecution witnesses were available?

3. Was the petitioner-defendant denied due process and equal protection of the law by the State of New York where after his conviction the prosecutor and defense trial counsel had in their possession and within their knowledge for 33 years a written confession from a condemned prisoner at the State Death House absolving the petitioner and the State Courts refused to apply same retroactively to reverse the judgment of conviction?

Constitutional Provisions Involved

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Constitutional Provisions Involved

Amendment XIV

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statement of the Case

The petitioner-defendant Anthony Riccardi was indicted by a State of New York Kings County Grand Jury on March 11th, 1937, for the crime of Robbery in the 1st Degree, while armed, along with related offenses.

On March 31st, 1937, in the County Court of Kings County (Brancato, J.), Riccardi was found guilty by jury verdict of the crime of Robbery in the 1st Degree while armed. On April 12th, 1937, he was sentenced as a first felony offender to a term of 20 to 40 years. This was a cumulative sentence which covered 15 to 30 years for Robbery in the 1st Degree and an additional 5 to 10 years for being armed with a dangerous weapon.

The Appellate Division, Second Department of the Supreme Court of the State of New York, affirmed the conviction without opinion in People v. Riccardi, 253 A.D. 724 (1937). There was no further

ppeal taken to the State's high appellate court ecause Riccardi lacked the necessary funds to ontinue the appellate process. [3]

On October 15th, 1970, Riccardi filed a peti- on for a Writ of Error Coram Nobis collaterally ttacking his 1937 conviction. After an evidentiary earing the Writ was denied (Vetrano, J.) on May rd, 1973 (2a). An opinion was filed and reported n People v. Riccardi, 73 Misc. 2d 19 (1973) ith matter dealing with the pretrial identification rocedure omitted.

The Appellate Division, Second Department, of he Supreme Court of the State of New York, af- rmed the Order without opinion in People v. iccardi, 40 A.D. 2d 1083 (1972), and on Febru- ry 27th, 1973 (Wachtler, J.) denied leave to ppeal to the New York State Court of Appeals.

History of the Case

On March 9th, 1937, a pawnshop on Myrtle venue and Navy Street, Brooklyn, New York was obbed at gunpoint. The assailants successfully ompleted their mission and made good their escape eeing with the proceeds of the robbery. The erpetrators were unknown to either the owner, awnshop employees or the customers present at e hold-up.

The following day, March 10th, 1937, Riccardi as arrested in Manhattan with his uncle Arnold

Riccardi on July 30th, 1950, was released on parole and sometime in 1961, was released from parole supervision.

Torella, a friend Jerry Navarro, and a then acquaintance and subsequently co-defendant Joseph Pepe (Riccardi: R12; Navarro: R20). Manhattan detectives apparently knew Pepe and when they saw him in casual greeting with Riccardi arrested them along with Torella and Navarro on Hester Street in downtown Manhattan. No specific charges were made against any of the four at that time albeit they were subjected to interrogation and search. Riccardi, Pepe and Navarro were subsequently turned over to the Brooklyn Detectives Kelly and Dillon of the 84th Detective Squad. Torella was released from the Manhattan precinct and Navarro was thereafter released from the Brooklyn 84th Squad after interrogation and without charges lodged against him (Riccardi: R12-13; Navarro: R20-21).

On the sole identification of one of the pawnshop customers at the time of the robbery, Riccardi was charged as one of the participants of the hold-up. On March 11th, 1937, Riccardi was indicted and arraigned for the crimes of Robbery in the First Degree while armed and related offenses. He entered a plea of "Not Guilty." He was thereafter tried on March 30th and 31st, 1937, in the then County Court of Kings County before a Jury and Judge. The sole and exclusive evidence against Riccardi was the identification of a sole witness, Walter Maim, who did not know Riccardi previously and who claimed to have observed him for the first time at the pawnshop for a matter of seconds wearing a leather jacket, cap pulled down over his head, wielding a gun. No other evidence was introduced against Riccardi either in the form of

the fruits of the crime, contraband or instrumentalities. Riccardi testified at his trial and asserted his innocence and that he had no prior criminal record. No other of the six or so witnesses at the pawnshop at the time of the robbery could identify Riccardi. The Jury nevertheless convicted him and presiding Judge Brancato sentenced Riccardi as a first offender on April 12th, 1937, for the crime of Robbery in the First Degree to a term of Fifteen (15) to Thirty (30) years and five (5) to ten (10) additional years for being armed. A total cumulative sentence of twenty (20) to forty (40) years was pronounced upon Riccardi.

The Appellate Division, Second Department, affirmed the conviction on direct appeal without opinion (People v. Riccardi, 253 A.D. 724 (1937). No further appeal was taken. No other collateral attack against the judgment except for the instant application had previously been made.

Riccardi was released from State Prison at Ossining, New York, about July 30th, 1950 (Riccardi: R89). He successfully completed his parole without violation in 1961 (Riccardi: R88). He is not under restraint of the instant judgment.

Reasons for Granting the Writ

Point I.

DEFENSE COUNSEL AND DISTRICT ATTORNEY'S POSSESSION, KNOWLEDGE AND SUPPRESSION OF EVIDENCE OF A MISIDENTIFICATION BY THE PEOPLE'S ONLY IDENTIFYING WITNESS COUPLED WITH THE PROSECUTION THREAT TO INDICT AND JAIL ITS WITNESS IF HE FAILED

TO MAKE THE IDENTIFICATION OR LATER RETRACTED IT COUPLED WITH A WRITTEN CONFESSION BY A CONDEMNED PRISONER AT THE STATE DEATH HOUSE GIVEN DIRECTLY TO LAW ENFORCEMENT OFFICIALS EXONERATING RICCARDI AMOUNTED TO A SUBSTANTIAL DENIAL OF A WIDE SPECTRUM OF CONSTITUTIONAL RIGHTS.

This is an unusual case in which we have the sharp contrast of petitioner Riccardi's arrest, indictment, conviction and sentence within a period of one month covering March 10th, 1937, to April 12th, 1937, and on the other hand a 33 year delay in the same Court reviewing and denying relief after an evidentiary hearing which not only required a new trial but completely exonerated Riccardi.

Our discussion of reasons in support of the Writ, comprises four general areas: (a) Ineffective assistance of counsel and misconduct of the prosecution; (b) the exonerating confession of Salvatore Gatti; (c) the failure of the State Court to perceive the thrust of Riccardi's argument of the suggestiveness of his identification in the police station; and (d) that this Court has jurisdiction to review the Judgment of Conviction despite the expiration of Riccardi's maximum sentence.

A. Ineffective Assistance of Counsel and Misconduct of the Prosecutor.

Thirty-three years after Riccardi's conviction, for the first time defense counsel at trial and on the direct appellate process, David F. Price, Esq.,

revealed a conversation between himself and the trial prosecutor Cone as follows (Price: R134-136):

> "After talking to the assistant District Attorney Cone, I saw Walter Maim; I think it was at the hotel at Pierrepont and Clinton Street, in this County. The defendant's mother and sister were with me, and I asked Maim about his testimony at the trial, and about his making an identification of my client, Anthony Riccardi, and he said, when I first saw Riccardi — he said to Detective Kelly, whose case it was, that it looked like the man, one of the men that was part and parcel to the robbery, but that he wasn't sure; and that Kelly said to him, that he need not have fear, that this was the man, and you identify him.
>
> After Kelly's assurances to that effect, he identified Anthony Riccardi as one of the perpetrators of this robbery.
>
> After all of this, I went back and communicated with Mr. Cone as to what had happened, and he told me that I have no right . . . . He told me that I had no right to talk to Walter Maim and that he was a witness for the People, and I said with all due deference to you, my friend, and he was my friend, I said that I had the right to talk to anybody I wanted to in the interest

of justice so long as I don't get the man to commit a crime.

He said I want you to stay away from Walter Maim, and I said, Charlie, I'm going to see him any time I want to see him.

I saw him after that, again, and he told me that Detective Kelly had told him not to change his testimony as to the identification or as to how the identification was made and that if he did, he would be indicted for perjury and that he would go to jail." (Stress supplied.)

In a most vigorous manner we urge upon this Court that the authorized representatives of the People in 1938, were clearly remiss in their mandatory duty to call to the trial Court's attention as far back as 1938, the information then defense counsel imparted to the trial prosecutor to the effect that witness Maim committed perjury in identifying Riccardi during the course of trial.

Trial prosecutor Cone was obligated to move immediately for a judicial determination. Instead he sought to conceal it and cautioned Riccardi's trial attorney, who was his friend, that he had "no right to talk with Walter Maim" since he was a witness for the People. "I want you to stay away from Walter Maim" (Price: R135). This was grossly improper conduct which deprived Riccardi of equal protection of law under the Fourteenth Amendment of the United States Constitution and requires

judicial cognizance and redress even at this date.

It is evident that the prosecution's undeviating design was to silence Riccardi's trial attorney. The trial prosecutor effectively accomplished this feat and when one couples this conduct with the threat to their own and only witness Maim we have a clear violation of Riccardi's rights which are of constitutional magnitude under the due process clause.

The requirement of due process does not end with a conviction. In the instant case there was a clear and evident absence of fundamental fairness on the part of the trial prosecutor that requires the intervention of this Court with a remedy that will satisfy standards of due process from the patently unjust conviction.

With respect to the representation of Riccardi's defense counsel we maintain that an examination of the whole record, both trial and coram nobis, compels the conclusion that because of it the Court and jury were precluded from hearing competent evidence on the issue of a mistaken identification through no fault of Riccardi.

Defense trial counsel failed to call Jerry Navarro a witness or question Riccardi and open an inquiry into the facts and circumstances concerning the pretrial identification. This was a clear violation of effective assistance of counsel.

The omissions fatal in nature alleged were not mere mistakes of counsel or trial errors of mistaken strategy which would preclude coram

nobis relief as Mr. Justice Vetrano opined and the respondent argued. They constituted in their totality a fundamental failure to properly represent Riccardi. Such failure is within the due process clause violation.

Counsel for Riccardi had a mandatory duty to investigate carefully all defenses of fact and of law that were available to appellant. When under the specific and peculiar facts of this case defense counsel fails to explore a defense which results in an unauthorized withdrawing from the fact-finding trial process a valid point of constitutional law the error is then of crucial importance and amounts to no less than a constitutional deprivation of counsel.

Trial and appellate counsel were also ineffective and clearly inadequate in the appellate process in Riccardi's direct appeal from the judgment of conviction. (Cf. appellant's brief to the Second Department in People v. Riccardi, 300 N.Y.S. 1356 (1937)), and in the deliberate failure to pursue the appellate process to the Court of Appeals. The reason given by Riccardi's then counsel for deserting the appellant in the direct appellate process was because, ". . . I don't think they could finance it" (Price: R143). When one considers the factors herein — the speed from indictment to trial of less than 3 weeks — the failure of appellate argument on identification in the light of the failure to explore the issue in the trial process through a valid constitutional inquiry on mistaken identification through Navarro, Kelly, Maim and Riccardi the deprivation

is so flagrant as to constitute an abridgement of Riccardi's right to a fair trial and adequate appellate review. Under the rationale of People v. Montgomery, 24 N.Y. 2d 130; People v. Savvides, 1 N.Y. 2d 554 (1956); People v. Steele, 65 N.Y.S. 2d 214 (Gen. Sess. 1946); and Eli Frank on Coram Nobis (Main volume) at pp. 27-31, in particular the case of Bertram M. Campbell, at pp. 29-30, the State Courts failed to adequately consider Riccardi's constitutional claims that came to light 33 years after his conviction.

The ineffective and inadequate assistance of counsel was spread throughout the Coram Nobis record. Judge Vetrano's findings of fact and conclusions of law in denying post-conviction relief in the light of defense counsel's admissions that for 33 years he actually knew of evidence which would cast doubt on the only identifying witness against Riccardi should shock the conscience of this Court.

Moreover, defense counsel's admission that as early as 1938, both he and prosecutor Cone had knowledge of the threats made by Detective Kelly against People's witness Maim was so blatantly prejudicial to Riccardi that this conviction cannot withstand 33 years of silence.

In our appeal from the denial of Coram Nobis relief in the Appellate Division, Second Department, and in our application for Leave to Appeal to the Court of Appeals we vigorously attacked and raised the issues of defense counsel's representations and

the conduct of law enforcement officials to no avail despite the fact of People v. Bennett, 29 N.Y. 2d 462 (1972) at p. 467, whereat the Court stated:

> "Although it has been said that we will not, as a general rule, 'make an initial determination of incompetency' absent 'a motion or other application. . . by defendant to the trial court' (People v. Brown, 28 N.Y. 2d 282, 286, 287). We will not invoke or apply the rule where the defendant's deprivation of effective representation is as gross and as manifest as it was in the present case. The proper administration of justice demands that violation of a defendant's constitutional right to counsel and a fair trial may be raised for the first time in our court."

Riccardi and Bennett stand on equal footing. Bennett's ineffective assistance of counsel appeared in the trial record itself, whereas Riccardi's appears in the Coram Nobis record. In this respect Riccardi was far more prejudiced than Bennett because of the lapse of 33 years of silence by defense counsel.

The issue here is not the reputation of then defense and appellate counsel as a member of the Bar, unquestionably unblemished. What is important is conduct in the isolated Riccardi case. The issue here we reiterate is one of constitutional requirement of legal representation not in an overall series of cases but in this one specific

case. Legal representation at trial and in the appellate process is one recognized of substance and not of form. The legal conduct here is not satisfied or justified by a pro forma or token appearance any more than one may label the waiving of a valid constitutional inquiry into the in-court and pretrial identification of Riccardi as a matter of trial strategy.

Certainly Riccardi never waived his constitutional claim for a timely and proper inquiry as to his identification, and all post-conviction factors concerning misidentification and threats made to the only identifying witness. The United States Supreme Court has set standards in considering such waiver in Henry v. Mississippi, 379 U.S. 443 (1965) and Bookhart v. Janis, 384 U.S. 1 (1966). See also O'Conner v. Ohio, 385 U.S. 92 (1966).

The Henry doctrine contemplates that a binding waiver may ordinarily be made as long as the failure to assert the claim is predicated upon a belief that some benefit for the defendant would thereby be secured. Henry also noted that exceptional circumstances may preclude application of the "waiver by trial strategy."

In Bookhart, the Court found a situation under exceptional circumstances where it was inappropriate for an attorney's trial strategy to bind the defendant without an express approval from the defendant.

Reasons for Granting the Writ

A reading of Henry and Bookhart compels the determination that Riccardi's case falls under "exceptional circumstances" and that the fatal omissions of his defense counsel are not binding upon him because the entire record reflects an absence of express approval or constitutional waiver. Under no circumstances or set of facts can it be argued that Riccardi benefited by the conduct of his counsel and the trial prosecutor. It is evident that as a matter of law Riccardi was prejudiced thereby and received not the slightest advantage.

The application for Certiorari is Riccardi's last opportunity for a review of his constitutional claims. In effect this Court is the last Court of resort because Riccardi's maximum sentence for all intents and purposes has expired. Even though he has exhausted his State court remedy, he cannot effectively make a claim of being in custody and therefore cannot resort to a federal Writ of Habeas Corpus in order to test the constitutionality of his conviction and to vindicate those rights secured to him under the Constitution.

The lack of jurisdiction for habeas relief absent custody make it imperative to Riccardi's cause that this Court assume jurisdiction and grant Certiorari since through no actual fault of his Riccardi has seen the expiration of his maximum sentence before knowledge was imparted to him as to the ineffective assistance of counsel and the misconduct of law enforcement authorities 33 years after his conviction.

B. Salvatore Gatti's Confession

The confession of Salvatore Gatti of January 5th, 1939, was written before his electrocution at Sing Sing Prison and given to the New York penal authorities. It was in fact initialed by Chaplain McGaffrey and then Warden Lawes, both gentlemen since deceased (R236-237). The statement was thus given under the most controlled and direct circumstances to the authorities of the State of New York. Moreover, copy of the statement was immediately sent to Kings County District Attorney William F. L. Goeghan, the following day, January 6th, 1939 (R239), and on January 9th, 1939, the Governor of the State of New York, the Honorable Herbert H. Lehman, was likewise notified (R240). On January 7th, 1939, the Kings County District Attorney acknowledged receipt of the Gatti statement (R241). Warden Lawes also took the precaution to notify the Commission of Correction in Albany, New York, Honorable Edward P. Mulrooney, on January 9th, 1939 (R238). However, notwithstanding the fact that two men were in prison, Riccardi and his co-defendant Pepe, at the time, the discretionary authority in Warden Lawes to halt the electrocution of Gatti was not exercised. The State of New York put Gatti to death in legal execution of his sentence and it was the State of New York that now claimed that the death of Gatti prevented it from conducting an adequate investigation and placed a series of legal obstacles involving evidentiary rules which would prevent the coram nobis Court from even considering the Gatti confession. As a matter of fact the posture of

the District Attorney during the course of the post-judgment hearing below was not even to admit that they had ever seen or received the Gatti confession. The District Attorney thus assailed the admissibility into evidence of the Gatti statement and once admitted maintained that it did not meet requirements of authenticity. Whether the prosecution was unmindful or not of the results of the totality of its actions the net effect of Gatti's electrocution was to suppress any possibility of immediate vindication of Riccardi.

The thrust for laying the foundation of the receipt of a declaration against penal interest is naturally authentication. What must be decided is if Gatti had in fact any motive to misrepresent the facts given in his statement. The evidence is uncontradicted that Riccardi never knew Gatti. The crux of the issue to be fairly met is what did Gatti have to lose on the throes of his electrocution by absolving Riccardi? Even if he were subjected to another criminal prosecution he still faced electrocution on a previous murder conviction. However, it is precisely the fact of impending death that gives greater authenticity to the Gatti statement. As mentioned in People v. Sarazano, 212 N.Y. 231, 234:

> "The principle upon which dying declarations are received in evidence is that the mind, impressed with the lawful idea of approaching dissolution, acts under a sanction equally powerful with that which it is presumed to feel by a solemn appeal to God upon oath."

We do not mean to imply in any manner that the Gatti declaration was a dying declaration, one of several other exceptions to the hearsay rule. We do, however, stress that the argument that Gatti would lie at the threshold of death rather than state the truth is a concept alien to Anglo-American jurisprudence. People v. Allen, 300 N.Y. 222, 227-228; People v. Ludkowitz, 266 N.Y. 233, 239; Sheppard v. United States, 290 U.S. 96; Wigmore, Evidence 3rd Edition, Sec. 1452.

Gatti among other things declared (R236-237):

> "that Anthony Riccardi if he was convicted of the crime that took (place) on March 9 or 10 of a pawn shop on Myrtle Avenue and Navy Street, Brooklyn, N.Y., at about 10 A.M. he or any one else that is convicted of that crime is innocent — for I was one of the men who held it up and know the others were never caught." (Emphasis supplied.)

A few minutes after making the statement Gatti was electrocuted (R76).

The objections that the coram nobis Court noted against crediting of the Gatti confession were not as to authenticity but whether or not the statement was made under circumstances of "trustworthiness" (R78). The Court opined "the declaration by a convicted murderer a few minutes before electrocution does not meet that test" (R79). The coram nobis Court was thus in error in making such an absolute rule for here the declaration against

penal interest was not made to some third party with no relationship to the authorities responsible for Riccardi's imprisonment. Here the New York State authorities had the opportunity to verify the Gatti statement in a myriad of ways. Their failure to investigate cannot now be assigned to Riccardi. The fact is that had the statement been investigated Gatti could have been subjected to another criminal prosecution and imprisonment and then subsequently electrocution on the prior murder conviction. Moreover, the People of the State of New York would have satisfied themselves by confronting Gatti with his declaration and verifying it further with him and with a number of witnesses who were victimized at the pawnshop premises on the date of robbery if in fact he was telling the truth. The callous indifference demonstrated by the People does not satisfy the interests of justice nor can the State of New York cling to a felony conviction against Riccardi in an effort to cover, maintain and compound the essential injustices of this case.

It is interesting to note that in the opinion of the coram nobis Court it would take less to convict a person accused of murder under the rule in a dying declaration that it would to exonerate Riccardi under the Court's guidelines for the receipt of a declaration against penal interest under the controlled circumstances of the instant case.

The last objection raised by the coram nobis Court in relation to the Gatti confession was the matter of retroactive application of People v. Brown, 26 N.Y. 2d 88 (1970).

Brown overturned a long standing rule against the admissibility of declarations against penal interest. Greenfield v. People, 85 N.Y. 75 (1881); Donnelly v. United States, 228 U.S. 243 (1913). It squarely placed New York within the more desired and majority rule permitting such evidence against penal interest. Cf. Model Code of Evidence, Rule 509 (1); Wigmore on Evidence, 3rd Edition, Sec. 1476; Richardson, 9th Edition, Sec. 241. The apparent requisites for receipt of such a declaration in evidence require an evidentiary foundation that the declarant is dead; the declaration when made was against a penal interest in that it subjected the declarant to criminal responsibility; the declarant had competent knowledge of the facts; there was no probable cause to misrepresent the facts and in criminal prosecutions there is an apparent fifth qualification requiring that the existence of the declarant and an evidentiary connection between him and the commission of the crime be likewise established. It was contended by the Court below that since we are essentially dealing with a rule of evidence no constitutional issue is involved or principal mandated nor does the omission of the Gatti confession really effect the integrity of the fact finding process (R82). This is contrary to Chambers v. Mississippi, 93 U.S. 1038 12 Cr.L. 3150 (1973), decided by this Court on February 21, 1973.

It is evident that under the facts in the Riccardi case the rule of law announced in Chambers, supra, is of limited application because there appears to be no factual accounts of any similar cases. Moreover, we are not dealing here with a

new determination if retroactively applied would mean wholesale exit from our prisons or a swamping of our judicial system already burdened with old cases for retrial. Mr. Justice Harlan although writing for the minority in Desist v. United States, 394 U.S. 244 (1969), clearly pinpointed the problem when he generally attacked the retroactive versus prospective doctrine. He said when one person is granted relief and another is not the Court must give a "principal reason for acting differently" Desist, supra. If Brown and Chambers received the benefit of the new exception to the hearsay rule why not Riccardi? There is no legitimate rationale for holding Brown-Chambers sweep prospective. The principled reason for holding Brown-Chambers retroactive is the same as in Jackson v. Denno, 388 U.S. 293 (1967) and People v. Huntley, 15 N.Y.2d 72. The basis for the prospective application of new rules is to satisfy purpose, reliance and judicial administration, Desist, supra, 249. There is no judicial fiat or mandate to prevent Riccardi from benefiting from the Brown-Chambers rule merely because it is a rule of evidence. The Brown-Chambers decisions is not a police deterrent case like Linkletter v. Walker, 381 U.S. 618 (1965), where the Court was interested in curtailing some police or law enforcement practices or conduct by applying the exclusionary rule. The police have not relied on past judicial decisions or administrative actions that now requires modification or curtailment. The Gatti confession was self-inspired and was not the product of police activity previously sanctioned and now forbidden. The People cannot claim reliance on past accepted practices. The retroactive application of the Brown-Chambers

rule would not burden or create judicial havoc or hardship nor open a pandora's box of evils under the limited and factual account of the Riccardi case.

C. State Court Failed to Perceive the Thrust of Riccardi's Argument on the Suggestiveness of his Identification in the Police Station.

At the trial the only testimony adduced against Riccardi involving him in the pawnshop robbery was the Maim identification. This witness indicated he never knew Riccardi previous to the robbery. On March 9th, 1937, Maim said he entered the pawnshop premises while the robbery was in progress. He further testified that he saw a man near the entrance door wearing a leather jacket with a cap over his head. The assailant was waiving a gun at Maim and quickly moved toward him spinning him around. Maim was taken to a back room. This was the only time he saw the perpetrator who Maim claimed at trial was Riccardi. This in fact was the entire prosecution's case against Riccardi. The coram nobis Court viewed the identification as follows (Vetrano, J.: R66-67):

> "At the trial, Maim testified that at about 9:00 a.m. on March 9th, 1937 he went to the pawnshop to redeem a coat which he had pledged. He opened the front door of the store about 1 1/2 feet. He first saw the defendant in the middle of the store about 12 to 15 feet from him. The defendant was facing him and walking very quickly toward

him and had a gun in his hand. On reaching him the defendant pulled him by the coat about two yards into the store. The witness protested and the defendant threatened him and ordered him to go to the rear of the store. This verbal exchange took place at the entrance of the store and the witness saw the defendant's face and the clothes that he was wearing. The defendant then got behind Maim and pushed him into a rear room of the store.

On cross-examination Maim testified that on March 10th, 1937 at about 4:00 p.m., he went to the Poplar Street station house at the request of the police. He was not cross examined as to when or under what circumstances he saw the defendant in the station house or whether there was a show-up; no questions were asked of him by the defendant's attorney with respect to a suggestive pretrial confrontation; nor did the defendant conduct a voir dire on the question."

The coram nobis Court failed to perceive the thrust of Riccardi's argument on the unnecessary suggestive identification at the precinct which led inexorably to his conviction in the trial that followed. Not only did Riccardi raise the issue of his constitutionally impermissive identification but likewise through the evidence produced at the coram nobis hearing was it learned that the People's only witness, Walter Maim told arresting officers that he wasn't sure if Riccardi was one of the culprits (Price: R134-136). The prosecution

through Detective Kelly suppressed this evidence and failed to bring it to the attention of the Court and defense. The responsibility for the suppression by the People was furthermore compounded by Detective Kelly when he threatened Maim with a perjury indictment and jail if he changed his identification testimony against Riccardi (Price: R134-136).

The Court's reliance in the coram nobis proceeding on People v. Bennett, 37 A.D. 2d 631 (2nd Dept. 1971) (R70-71), was misplaced since this decision held that notwithstanding the factual merits of a petition alleging a constitutionally impermissive trial identification, coram nobis was not the proper remedy to entertain this argument by collateral attack upon a judgment of conviction. While the Bennett court recognized that United States v. Wade, 388 U.S. 219 (1967) and Gilbert v. California, 388 U.S. 263 (1967), held that a pretrial identification was a critical stage of a criminal prosecution requiring the right to counsel under the Sixth Amendment, U.S.C.A., the Court nevertheless maintained that Stovall v. Denno, 388 U.S. 293 (1967), asserted that such a right to counsel would receive prospective application only. The coram nobis Court was of the same opinion. However, the Bennett court also recognized that under the totality of circumstances the exclusionary rule of an eyewitness identification would be applied retroactively if due process were offended.

Nowhere in its denial opinion did the Court claim that Riccardi's contentions were without merit. It merely granted that even if his claim were

valid he could not avail himself of collateral attack upon his judgment of conviction via a coram nobis proceeding. Like the Bennett court, Mr. Justice Vetrano relied principally on People v. Brown, 13 N.Y. 2d 201 (1963); People v. Howard, 12 N.Y. 2d 65 (1962); and People v. DeMino, 35 A.D. 2d 979 (2nd Dept. 1970), aff'd, 29 N.Y. 2d 602 (1971).[4] While it is true that these decisions dealt with coram nobis proceedings and its non-availability on raising the issue of insanity as a predicate for coram nobis relief where the issue was actually raised and decided by the trial court adversely to the defendant (Brown, supra); that coram nobis could not serve to correct a right to counsel issue where the record indicated that defense counsel was finally furnished who could have corrected any prejudice from the previous lack of an attorney (Howard, supra), or as in DeMino, supra, where defendant failed to raise a double jeopardy issue on his retrial and appeal and attempted to raise same for the first time in a coram nobis proceeding. None of these cases relied upon by the Court below in denying Riccardi's request for coram nobis relief actually deal with the question of Riccardi's unconstitutionally suggestive precinct identification when the only eyewitness against him told the arresting officer that he was not sure it was Riccardi. When the possibility existed that Witness Maim might recant his trial identification he was threatened by the People with a perjury indictment and jail. After Maim's oral statement to

4. DeMino's conviction was reversed by this Court on January 17, 1972. DeMino v. New York, 404 U.S. 1035, 92 S.Ct. 720 (1972).

Riccardi's counsel and after conversation between counsel and the prosecutor, Maim quietly disappeared from the scene.[5]

People v. Robertson, 12 N.Y. 2d 355 (1963) held that coram nobis proceedings were very properly the vehicle to redress grievances where as in that case a detective had been mistaken in his trial testimony although no intentional misconduct could be attributed to the prosecution. In Riccardi we not only have a constitutionally impermissive trial identification considering the totality of circumstances but likewise we have a case of suppression of evidence clearly attributable to the People. See Alcorta v. Texas, 355 U.S. 28 (1957) and Brady v. Maryland, 373 U.S. 83 (1963) with law and cases cited therein.[6]

D. This Court has Jurisdiction to Review Even Though Riccardi's Maximum Sentence Expired.

Riccardi "has a substantial stake in the Judgment of Conviction which survives satisfaction of the sentence imposed. Fiswick v. United States, supra, 329 U.S. at 222. The case is not moot." Sibron v. New York, 392 U.S. 40 (1968) at p. 58. See also Ginsberg v. New York, 390 U.S. 629 (1968) at p. 633 and Peyton v. Rowe, 391 U.S. 54 (1958) at p. 64.

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5. The whereabouts of Maim if alive are unknown.

6. Even if favorable evidence is not admissible at trial, its suppression is constitutionally impermissible when it is "favorable" because it is "useful." Giles v. Maryland, 386 U.S. 66 (1967) (Fortas, J., concurring).

Lastly, we conclude with a quote from Sibron, supra, at p. 51, whereat the Court stated:

> "On numerous occasions in the past this Court has proceeded to adjust the merits of criminal cases in which the sentence had been fully served or the probationary period during which a suspended sentence could be reimposed had terminated."

Conclusion

For all the reasons stated herein, the petition for a Writ of Certiorari should be granted.

Respectfully submitted,

ROSENBERG, FUSFIELD & LOPEZ

s/ Frank A. Lopez
FRANK A. LOPEZ
Attorneys for Petitioner

Brooklyn, New York
May 25th, 1973

FRANK A. LOPEZ
Of Counsel

APPENDIX

APPENDIX A - Judgment - Order of the New York State Court of Appeals Denying Leave to Appeal

STATE OF NEW YORK
COURT OF APPEALS

BEFORE: HON. SOL WACHTLER,
Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK

against

ANTHONY RICCARDI

I, SOL WACHTLER, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at Mineola, New York
February 27, 1973

s/ Sol Wachtler
Associate Judge

*Description of Order:
Order of Appellate Division dated 12/18/72

APPENDIX B – Opinion of the Supreme Court of the State of New York, In and for the County of Kings, Denying the Writ of Error Coram Nobis (Vetrano, J.)

SUPREME COURT – KINGS COUNTY

(CRIMINAL TERM, PART I-A)

By VETRANO, J.

Dated May 1, 1972

Ind. No. 16419/1937

THE PEOPLE OF THE STATE OF NEW YORK

vs.

ANTHONY RICCARDI

In this coram nobis proceeding instituted 33 years after conviction, the petitioner, hereinafter referred to as the defendant, moves to set aside and vacate the judgment of conviction on two grounds: (1) that the pretrial identification procedure was so prejudicial as to taint the in-court identification and deprive the defendant of due process of law, and (2) that a subsequent confession by a third person absolved the defendant of the crime charged.

Opinion

The defendant and a co-defendant, one Joseph Pepe, were found guilty on March 31, 1937, after a trial by jury, of robbery in the first degree while armed, grand larceny in the first degree, and assault in the second degree, committed on March 9, 1937. On April 12, 1937 the defendant was sentenced to a term of 20 to 40 years in prison. The judgment of conviction was unanimously affirmed by the Appellate Division on December 3, 1937 (300 N.Y.S. 1356). The defendant was imprisoned until 1950, when he was released on parole. The parole was terminated in 1961 and his sentence has been served.

At the trial the District Attorney offered no evidence of any showup at the station house. The case was tried solely on the in-court identification of the defendant by one witness, Walter Maim, who identified the defendant in the courtroom as being a participant in the robbery.

At the trial, Maim testified that at about 9:00 a.m. on March 9, 1937 he went to the pawnshop to redeem a coat which he had pledged. He opened the front door of the store about 1 1/2 feet. He first saw the defendant in the middle of the store about 12 to 15 feet from him. The defendant was facing him and "walking very quickly toward him and had a gun in his hand." On reaching him the defendant pulled him by the coat about two yards into the store. The witness protested and the defendant threatened him and ordered him to go to the rear of the store. This verbal exchange took place at the entrance of the store and the witness

saw the defendant's face and the clothes that he was wearing. The defendant then got behind Maim and pushed him into a rear room of the store.

On cross-examination Maim testified that on March 10, 1937 at about 4:00 p.m. he went to the Poplar Street station house at the request of the police. He was not cross-examined as to when or under what circumstances he saw the defendant in the station house or whether there was a showup; no questions were asked of him by the defendant's attorney with respect to a suggestive pretrial confrontation; nor did the defendant conduct a voir dire on the question.

The defense was an alibi, namely, that at the time of the crime the defendant was home in bed. The defendant took the stand, and testified as to denial of his guilt and the alibi. He gave no testimony as to any pretrial confrontation at the station house. On cross-examination he admitted having met with his uncle, who was employed at the Jewelers' Exchange, at a nearby cafeteria on the day before, the afternoon after, and the day following the robbery. The proceeds of the robbery consisted of jewelry. The verdict implies that the jury disbelieved the defendant and his alibi witnesses.

Upon the hearing conducted by this court, the defendant testified that he, the co-defendant Pepe, one Jerry Navarro, a friend of his, and defendant's uncle Dorella were picked up on March 10, 1937 in Manhattan and taken to the Elizabeth

Street police station. After questioning, Dorella was released and the others were removed to the Poplar Street station house in Brooklyn at about 3:00 p.m. There the defendant was taken into a room in which Detective Kelly was standing with the witness Maim. Kelly asked Maim, "That is him, isn't it?" and Maim nodded affirmatively.

The defendant's friend, Navarro, who was not arrested, testified substantially to the same effect. He also testified that prior to the trial he went to the office of the defendant's attorney and told him what he had seen and heard at the station house with respect to the showup. Although he advised the attorney "* * * whatever help I could give I am ready and available," he was not called by the defendant as a witness at the trial.

The attorney who represented the defendant on the trial testified that about three or four months after the judgment of conviction had been affirmed by the Appellate Division, he had a conversation with the witness Maim. Maim said, in substance, that when he first saw the defendant he told Detective Kelly that the defendant looked like the man but that he wasn't sure. Kelly had said to him that he need have no fear; that this was the man and he was to identify him. After Kelly's assurances he did identify the defendant as one of the perpetrators of the robbery.

The defendant's attorney testified that thereafter he had a second conversation with Maim, in which the latter stated that Kelly had instructed him not to change his testimony, and that if he did,

he would be indicted for perjury and go to jail. The attorney did not, however, institute any legal proceedings in defendant's behalf.

At the hearing the record of the trial and appeal was received in evidence. The District Attorney called no witnesses and relied upon the record.

The defendant relies upon the holding in Stovall v. Denno (388 U.S. 293) and contends that the pretrial confrontation at the station house was "so unnecessarily suggestive and conducive to irreparable mistaken identification" as to amount to a denial of due process. He argues that "it is not that the trial identification alone was insufficient to convict him at trial — an issue resolved on direct appeal — but that Maim's identification of the defendant should have been precluded or excluded from the evidence."

The defendant relies upon the holding in Stovall v. Denno (388 U.S. 293) and contends that the pretrial confrontation at the station house was "so unnecessarily suggestive and conducive to irreparable mistaken identification" as to amount to a denial of due process. He argues that "it is not that the trial identification alone was insufficient to convict him at trial — an issue resolved on direct appeal — but that Maim's identification of the defendant should have been precluded or excluded from the evidence."

Opinion

The defendant's contention may not be made for the first time on a coram nobis application, regardless of its factual merits (People v. Bennett, 37 A D 2d 631). In Bennett the defendant was convicted of robbery and the judgment affirmed on appeal. The defendant in that case asserted that at the station house the police had informed the victim of the robbery that the defendant had been arrested and convicted many times of robbery and assault; assured him they were certain that the defendant had taken part in assaulting him and robbing him; and prompted him into making a positive identification by numerous suggestive references to defendant's past arrests and convictions. Thus, the same claim made by this defendant was advanced in that case. The court stated (p. 632) the rule to be applied:

> "Regardless of the merit of appellant's factual assertions, we are of the opinion that this argument cannot be asserted for the first time on a coram nobis application. Coram nobis is 'an emergency measure born of necessity to afford a defendant a remedy against injustice when no other avenue of judicial relief is, or ever was, available to him' and may not be used as a substitute for an appeal (People v. Howard, 12 N Y 2d 65, 66, cert. den. 374 U.S. 840). The holding in Stovall relied upon by appellant was not a new rule to be applied retroactively, but was specifically stated to have always been the law. Thus the contention now urged by appellant was available to him at the trial. * * * Having

> failed to raise the issue at trial or on appeal, appellant cannot now seek to set aside the judgment by resorting to coram nobis (People v. Brown, 13 N Y 2d 201). His failure to present the issue at the proper time precludes the assertion of it at a later date in a collateral proceeding (see People v. De Mino, 35 A D 2d 979)." (Emphasis supplied.)

In this case the trial took place within three weeks after the defendant's arrest. The facts were certainly fresher in his mind than at the time of the hearing 33 years later. The District Attorney on the trial offered no evidence of any station house showup. The defendant testified in his own behalf, yet uttered not one word as to any station house confrontation, even though Maim had already testified that he saw him there. "The defendant gave nc testimony at the hearing before this court that he had not informed his counsel as to a showup at the station house. Assuming that the defendant did not inform his lawyer, which is most unlikely, Navarro brought the facts now asserted to the attention of the lawyer before the trial."

The defendant's retained lawyer, who had long experience in criminal cases, had ample opportunity to explore every facet of what occurred in the station house by pursuing his cross-examination of the witness Maim. The uncertainty or suggestiveness of an initial pretrial confrontation could always be inquired into on a trial long before the Stovall case and was a recognized ground of attack on the in-court identification.

It is clear that it was counsel's strategy at the trial not to inquire into any pretrial confrontation and make that an issue. The defendant's attorney decided in the exercise of judgment and trial tactics not to cross-examine Maim on the issue, present the testimony of the defendant, or to call the witness Navarro as to the matter. The defendant may not now resort to coram nobis where he has failed to raise an issue available to him at the trial or an appeal (People v. Brown, 13 N Y 2d 201; People v. Damon, 24 N Y 2d 256, 261).

Where a competent lawyer chooses not to raise a point of constitutional law because he believes it to be in the best interests of his client not to do so, it is not for the court to say that he should have done what he thought best not to do (People v. Derrenzio, 19 N Y 2d 45), except where the defendant's deprivation of effective representation is inadequate and ineffective as to deprive the defendant of a fair trial (People v. Bennett, 29 N Y 2d 462), which is not the case here. Coram nobis is not the proper remedy for an error of judgment or tactics during the course of a trial (People v. Brown, 7 N Y 2d 359, 361). Since the defendant failed to raise the issue at the proper time, he is precluded from asserting it in a collateral proceeding instituted at a later date (People v. Bennett, 37 A D 2d 631; People v. De Mino, 35 A D 2d 979).

The second ground urged by the defendant is that a statement made by one Salvatore Gatti absolving the defendant from the crime charged

was admissible in evidence in the coram nobis proceeding as a declaration against penal interest and he relies on People v. Brown (26 N Y 2d 88).

Gatti was arrested on October 19, 1937 on a charge of murder, thereafter convicted, and sentenced to death and electrocuted on January 5, 1939.

On the hearing the defendant's attorney testified that in about November, 1938, a detective attached to the Poplar Street Precinct voluntarily informed him that Gatti possessed information relating to this defendant's case. On December 1, 1938 the attorney wrote to Gatti requesting any information that would be helpful to his client. The latter went unanswered. However, the lawyer did receive a telephone call from a woman who identified herself as Gatti's sister. She stated that if he tried to get her brother to confess to a crime, she would come down to the office and kill him. After that conversation he did not attempt to communicate with Gatti.

On January 5, 1939 Gatti wrote and signed a two-page statement which was witnessed by the chaplain and warden of Sing Sing Prison, implicating himself and absolving the defendant of the crime for which the defendant had been convicted, and was then serving his sentence. Gatti declared:

> "that Anthony Riccardi if he was convicted of the crime that took on March 9 or 10 of a pawn shop on Myrtle Ave. and Navy Street Brooklyn N.Y. at about 10 A.M. he

> or any one else that is convicted of that crime is innocent — for I was one of the men who held it up and know the others were never caught —" (emphasis supplied*.)

A few minutes after making the statement Gatti was electrocuted.

The prison chaplain turned the statement over to the warden and it was placed in Gatti's file. On January 18, 1939 the chaplain wrote a letter to the defendant's attorney informing him of the statement and that a copy could be obtained from the warden. The statement was produced at the hearing and received subject to subsequent ruling by the court as to its admissibility.

It was formerly the law in this state that a declaration against penal interest was not admissible in a criminal proceeding as an exception to the exclusionary hearsay rule (Greenfield v. People, 85 N.Y. 75; Kittredge v. Granis, 244 N.Y. 168, 175, 176; Richardson on Evidence, 9th Ed., §§241, 348). The same rule prevailed in the Federal courts (Donnelly v. United States, 228 U.S. 243).

In People v. Brown (26 N Y 2d 88), decided on January 21, 1970, the old rule against the admissibility of declarations against penal interest was abandoned. The court stated at page 94:

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* The court in passing notes that two men were actually tried and convicted in this case.

> "The rule in New York should be modernized to hold that an admission against penal interest will be received where material and where the person making the admission is dead, beyond the jurisdiction and thus not available; or where he is in court and refuses to testify as to the fact of the admission on the ground of self-incrimination."

The court in Brown equated declarations against penal interests with those against pecuniary interests, stating that the distinctions between the two did not "withstand analysis" (p. 91). Thus, although the court set forth no guidelines, with proper modification, in order that a declaration against penal interest be received in evidence, it must appeal (1) the declarant is dead, beyond the jurisdiction of the court and not available, or where he is in court he refuses to testify as to the fact of the admission on the ground of self-incrimination; (2) that the declaration when made was against the penal interest of the declarant; (3) that the declarant had competent knowledge of the facts; and (4) that there were no probable motives to misrepresent the facts (Richardson on Evidence, 9th Ed., §238; People v. Brown, supra, p. 94). In a criminal case there is a fifth requisite; there must be other evidence in the case establishing the existence of the declarant and connecting him with the commission of the crime (People v. Brown, supra; People v. Spriggs, supra; dissenting opinion of Mr. Justice Holmes in Donnelly v. United States, supra; Fine, Declarations Against Penal Interest, 21 Syracuse Law Review 1095, 1104, 1110, 1130).

The underlying reasons for admitting a declaration against penal interest to the hearsay rule are necessity and "circumstantial probability of trustworthiness" (Richardson on Evidence, 9th Ed., §237). The rationale of the new rule was stated by the California court (People v. Spriggs, supra): "* * * a person's interest against being criminally implicated gives reasonable assurance of the veracity of his statement made against that penal interest." Unavailability by reason of death or otherwise in and of itself is not the test (Ellwanger v. Whiteford, 15 A D 2d 898, affd. 12 N Y 2d 1037). The court must be able to conclude that the statement is against penal interest and that there is a sufficient "probability of trustworthiness" to fit the hearsay exception before it is received in evidence.

There must be an awareness by the declarant at the time of the making of the statement that it will render him subject to criminal prosecution to give the statement the inherent "probability of trustworthiness" (Richardson on Evidence, 9th Ed., §244). The declaration by a convicted murderer a few minutes before electrocution does not meet that test. He was then aware that he could not be prosecuted for the crime in which he was implicating himself and exonerating another. Absent the necessary awareness, the statement lacks reliability.

In addition, the declarant knew at least a month before the making of the declaration that information was sought from him, yet he did nothing. His statement made after he had ample time to reflect upon a course of action should be treated

with suspicion entirely apart from the question of whether the declaration of a convicted murderer about to die should be regarded as sufficiently trustworthy in a post-conviction proceeding.

There is no independent evidence apart from the declaration establishing Gatti's connection with the commission of the crime. The fact that the trial record indicates that while two men were convicted, there were probably three who participated in the hold-up, is not the other independent evidence contemplated. The third man may have been someone other than Gatti.

The reasoning of the court in United States v. Dovico (380 F.2d 325, cert. den. 389 U.S. 944), a post-conviction proceeding is persuasive. In that case the declarant, originally a co-defendant who had pleaded guilty, made a statement to a cellmate while serving his sentence that the declarant had placed a container of cocaine in a trash receptacle for delivery to a purchaser; that Dovico was innocent and that declarant had committed the crime without Dovico's knowledge. The declarant had further stated that he had not testified because of fear of prosecution. The declarant subsequently died. In holding that the statement was not a declaration against penal interest, the court said (p. 327):

> "He [declarant] could not be prosecuted for the declaration against penal interest. He had not testified at the trial and was not exposed to any possible perjury charge. * * * Even a broadened penal interest ex-

ception must have some boundaries and must be limited at least to statements for which prosecution is possible at the time."

The statement made by Gatti is not admissible as a declaration against penal interest when measured by the applicable set of criteria.

Assuming arguendo that the statement, nevertheless, is admissible in evidence in the interests of justice or on a theory of the existence of special circumstances (Heinz v. Commonwealth, 136 Va. 728; People v. Lettrich, 413 Ill. 172), the question remains whether, as defendant contends, People v. Brown should be given retroactive effect.

If the court were dealing with a constitutional rule of criminal procedure, the criteria set forth in Stovall v. Denno (388 U.S. 293, 297) would be applicable (People v. Bailey, 21 N Y 2d 588, 596-597). The new rule in Brown represents a change in a rule of evidence with respect to hearsay. There is no change in constitutional interpretation; nor is there involved a constitutional rule of criminal procedure (People v. Kaiser, 21 N Y 2d 86, 97). Refusal to receive the statement in evidence will not violate any constitutional right of the defendant; nor will it have any effect on the "integrity of the fact finding process (Linkletter v. Walker, 381 U.S. 618)" (People v. Kaiser, supra, p. 98).

Opinion

The court concludes that no provision of the Constitution mandates the receipt in evidence of the Gatti statement, or that the Brown rule should be given retroactive application in a coram nobis proceeding.

Accordingly, the motion is denied in its entirety.

Submit order.

J.S.C.